



Adala (Suing as the legal representative and administrator of the Estate of Adala Muganda - Deceased) v Mwanzia (Environment & Land Case 3 of 2023) [2024] KEELC 5911 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 3 OF 2023
AY KOROSS, J
SEPTEMBER 19, 2024**

BETWEEN

**PETER NYANGA ADALA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE
ESTATE OF ADALA MUGANDA - DECEASED**

AND

CHARLES MWANZIA DEFENDANT

JUDGMENT

1. The plaintiff is the son and legal administrator of the estate of the late Adala Muganda (deceased) who died on 18/06/2007 and the parcel of land that is the subject of the dispute is land no. North Ugenya/ Doho/859 (suit property) that is registered in the deceased's name.
2. In a plaint dated 2/02/2017, the plaintiff asserted that without permission, the defendant trespassed onto the suit property in April 2009 and put up a structure therein that operated as a butchery and hotel before abandoning it on 31/12/2014.
3. As a consequence, he urged this court to issue orders for the demolition of the illegal structure by the defendant, and in default, the plaintiff does demolish it at a cost to be borne by the defendant. He also sought an order of permanent injunction against the defendant, his servants and agents, and the costs of the suit.
4. The law firm of M/s. A.G. Aburili & Co. Advocates entered an appearance for the defendant and filed a defence dated 25/10/2017. This defence was mostly composed of denials.
5. However, it posited the defence of lawful entry by stating the defendant had a license to occupy the suit property as a tenant and therefore, being a commercial dispute, this court lacked jurisdiction to



entertain the suit as the dispute fell within the jurisdiction of the Business Premises Rent Tribunal (BPRT). He therefore urged the court to dismiss the suit with costs.

6. The plaintiff's law firm on record M/s. Marisio Luchivya & Co. Advocates filed a reply to the defence dated 22/05/2018 in which the plaintiff reiterated the averments contained in the plaint and urged the court to strike out the defence and enter judgment as sought in the plaint.

The plaintiff's case and evidence

7. The plaintiff testified as PW1. His evidence was composed of his written and oral testimonies and documents he produced as Pex.1 – 3.
8. It was his testimony that he was the deceased's legal administrator and produced as Pex.1 a limited grant that was issued in his favour on 4/07/2016 in Ukwala PM Succession Cause.no. 32 of 2016. He rehashed the assertions that were contained in the plaint as earlier highlighted in the judgment. He also produced a copy of the suit property's title deed as Pex.2 which showed the deceased was the registered owner of the suit property.
9. On cross-examination by the defendant whose counsel did not attend court on the hearing date, he admitted that though the defendant had been his tenant for 6 years, his bone of contention was the offending structure which was built without his permission which the defendant had failed to remove.
10. He averred that he never agreed with the defendant that he could construct on the suit property or that there was any understanding that he (plaintiff) would refund him the construction costs and that in any case, he was unfamiliar with amounts that were expended towards such construction.
11. The plaintiff also denied knowledge of a tenancy agreement between his son Emmanuel Adala (Emmanuel) and the defendant concerning the structure. On re-examination, he reiterated the defendant was his tenant.

Defendant's case and evidence

12. The defendant testified as DW1 and his evidence was composed of his written and oral testimonies and documents he produced as Dex.1 – 3. Similar to the plaintiff, some of his statements were contained in his defence which was earlier highlighted in the judgment.
13. In addition, it was his testimony there subsisted a tenancy agreement over the suit property between him and the deceased which he produced as Dex. 1. He stated he used to pay rent through the plaintiff's agents and produced receipts that were allegedly issued to him. He was categorical that some of the rental payments used to be made by him through the Mpesa application.
14. He further averred that it was not plausible for him to be a trespasser as he was a lawful tenant and the plaintiff was all along aware of the structure. On being cross-examined, he testified that the structure that was constructed in 2009 was a 10 by 10 wooden structure that was constructed with Emmanuel's verbal permission.
15. It was his evidence that he paid rent of Kshs. 500/= towards the structure and Ksh.700/= towards the rented house thus the total rental sum was Ksh. 1200/=. He stated that he later moved to larger premises where he had been paying rent of Ksh. 2500/= while that of the structure was retained at Kshs. 500/=.
16. He stated that at his own volition and without a notice to vacate, he moved out of the suit property in December of 2014 thus leaving the structure behind. He stated that nonetheless, he continued paying rent for it upto June 2015.



17. During re-examination, he testified that he received a notice to vacate after criminal proceedings ensued between him and Emmanuel. He testified he had sought to be compensated for his construction costs.

Parties' submissions

18. After the parties' cases were closed, this court directed them to canvass their arguments by written submissions. The defendant's counsel did not file any submissions and if at all they will be filed, this court will not consider them.
19. Meanwhile, the plaintiff's counsel on record filed written submissions dated 21/03/2024 and in them, counsel identified 3 issues as arising for resolution which are inter alia, whether the plaintiff had the capacity to prosecute the suit; whether the defendant had illegally put up a structure on the suit property and whether the plaintiff was entitled to the reliefs sought.
20. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the plaintiff's counsel's arguments on the particular issue and also consider provisions of the law that were relied upon to advance the arguments.

Undisputed facts

21. After hearing both parties' evidence and considering the pleadings, it was undisputed the deceased was the registered owner of the suit property, the defendant was a tenant of the plaintiff, and by extent, that of the deceased's estate and paid rental sums, the defendant put up a structure on the suit property in April 2009 and the defendant stopped utilizing the suit property in December 2014.

Issues for determination, Analysis, and Determination

22. I have considered the pleadings, evidence adduced by the parties, as well as the plaintiff's counsel's submissions. Being guided by the provisions of law relied upon, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and, conceivably the issues arising for determination which shall be resolved systematically are;
 - I. Whether this court has jurisdiction to entertain the suit.
 - II. Whether the suit is time-barred.
 - III. Whether the plaintiff proved his claim of trespass.
 - IV. What orders should this court issue including an order as to costs?

I. Whether this court has jurisdiction to entertain the suit

23. This issue was never addressed in the plaintiff's submissions. The ELC is a creature of Article 162 (2) (b) of *the Constitution* and this Article as read together with the *Environment and Land Court Act* in particular Section 13 thereof, grants this court original and appellate jurisdiction to deal with disputes on matters touching on the environment and the use and occupation of, and title to land.
24. In the exercise of appellate jurisdiction as envisaged by Section 13(4) of the *Environment and Land Court Act*, this court hears and determines appeals emanating from subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court including those from the BPRT.
25. My understanding of the defendant's challenge of this court's jurisdiction is on the premise the parties had a landlord-tenant relationship over a business premise that he leased from the plaintiff or his family.



In his view, this matter should first have been filed before the BPRT which is created by Section 11 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.

26. Based on the contest, this court is called to examine the plaintiff's claim and to an extent, the evidence. It emerges that although it was uncontested the relationship between the parties was that of a landlord and tenant, and the plaintiff's claim is that of trespass by a tenant over land, and not that of a dispute over a controlled tenancy over the business premises that had been leased to the defendant by the plaintiff or his family. I, therefore, find that this court has jurisdiction to entertain the suit.

II Whether the suit is time-barred.

27. Trespass is a tortious action and as stipulated in Section 4(2) of the *Limitation of Actions Act*, such a claim must be filed within 3 years from when the cause of action occurred. This provision of law states: -

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

28. The plaintiff did not plead continuing trespass which is incessant and each fresh tort of trespass is a new cause of action that arises from day to day. Instead, it was undisputed the defendant put up the offending structure in April 2009.

29. Continuous trespass was defined in the decision of *Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a* [2018] eKLR as a trespass that is permanent and constitutes an invasion of another's land. A clear illustration of what constitutes a continuous trespass or not was well illustrated in *Blackstone, William. Commentaries on the Laws of England: Book III: of Private Wrongs*, edited by Thomas P. Gallanis, Oxford University Press, 2016 thus: -

“In trespasses of a permanent nature, where the injury is continually renewed, (as by spoiling or consuming the herbage with the defendant's cattle) the declaration may allege the injury to have been committed by continuation from one given day to another, (which is called laying the action with a *continuando*) and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. But where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando*; yet if there be repeated acts of trespass committed, (as cutting down a certain number of trees) they may be laid to be done, not continually, but at divers days and times within a given period.”

30. The averments in the plaint attempted to distance the plaintiff from the lease agreement that was produced before this court. Nonetheless, it emerged during the hearing that the defendant was his tenant having occupied the business premises for 6 years.

31. A scrutiny of the lease agreement over a one-house unit shows that it was entered between the defendant and Dominic Otieno Nyanga (Dominic) who represented the deceased's family. The lease was for a term of 3 years which ran from 1/09/2010 to 1/09/2013 but was subject to renewal. The monthly rent was Kshs. 1200/-.

32. The terms of the lease agreement are very clear and it can only be concluded and as contended by the plaintiff, that the defendant was never permitted to put up a structure on the suit property.



33. In any case, it was put up in the year 2009 which was long before the term of the lease commenced. Unfortunately, the defendant never joined Emmanuel in these proceedings to explain the circumstances of his entry.
34. Be that as it may, the cause of action arose in April 2009 meaning the plaintiff ought to have filed his claim by 30/04/2012 as required by Section 4(2) of the *Limitation of Actions Act* yet this claim was filed without leave on 2/02/2017 which was long after the cause of action accrued. Consequently, I must find that the plaintiff's claim is time-barred.
35. Finally, and for the reasons and findings stated hereinabove, a determination of issue (III) is rendered unnecessary. As to issue (IV), it is my ultimate finding that the plaintiff's claim is incompetent and it is hereby struck out. Since it is trite law costs follow the event and in the absence of a special relationship between the parties, I award costs to the defendant. Ultimately, I hereby issue the following final disposal order;
- a. The plaintiff's suit is hereby struck out with costs to the defendant.
- Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2024.

HON. A. Y. KOROSS

JUDGE

19/9/2024

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

N/A for plaintiff

Defendant

Court assistant: Ishmael Orwa

